IN THE

Supreme Court of the United States

October Term, 1977

No. ~~77-692~~

DOMINIQUE ORSINI

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURIS G. CEDERBAUMS,
30 Broad Street
New York, New York 10004
(212) 425-1060
Attorney for the Petitioner.

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Dominique Orsini prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on May 17, 1977, which affirmed a judgment of conviction previously entered against the petitioner in the United States District Court for the Eastern District of New York.

Opinions Below

Following the entry of a judgment of conviction in the District Court, the petitioner appealed to the Court of Appeals. On May 17, 1977, the Court of Appeals affirmed the conviction on the opinion below, reported at 424 F. Supp. 229. The order affirming is reproduced as Appendix "A" of this petition. The opinion of the Court below is annexed as Appendix "B."

Jurisdiction

On May 17, 1977, the Court of Appeals for the Second Circuit entered judgment against the petitioner.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provisions Involved

The questions raised in this petition involve the Due Process Clause of the Fifth Amendment and the Confrontation, Right to Counsel and compulsory process provisions of the Sixth Amendment to the United States Constitution, which are as follows:

Fifth Amendment

"No person shall . . . . . be deprived of life, liberty, or property, which due process of law . . . . . ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Questions Presented for Review

1. Whether the Trial Court's granting of the motion to quash a subpoena *duces tecum* issued by petitioner to Mr. Anthony Marro, a reporter for *Newsweek* Magazine, material and necessary to the jurisdictional hearing deprived defendant of compulsory process to obtain witnesses in his behalf, thereby denying him effective assistance of counsel?

2. Whether the manner by which petitioner's presence was obtained for trial — specifically the circumstances of his illegal abduction from Senegal — constituted the use of deliberate, unnecessary and unreasonable conduct by the United States government and its agents, amounting to a patent violation of due process principles which required the District Court to decline jurisdiction?

Statement of the Case

I. Introduction

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.) entered on December 17, 1976 sentencing appellant to a term of imprisonment of ten years upon his plea of guilty of conspiracy to violate the narcotics laws (21 U.S.C. §§ 173 and 174), and denying, *inter alia*, appellant's claim that the indictment against him should be dismissed because the Government had obtained jurisdiction over him by use of deliberate, unnecessary and unreasonable conduct amounting to a patent violation of due process principles, and a subpoena *duces tecum* issued pursuant to the hearing, on the jurisdictional claim. The judgment was affirmed by the Second Circuit Court of Appeals on May 17, 1977.

Appellant is presently incarcerated pursuant to the judgment.

II. Statement of Facts

In 1974, the appellant, **Dominique Orsini**, was indicted for a conspiracy to import and distribute narcotics into the United States by a grand jury sitting in the Eastern District of New York.

On August 6, 1975, pursuant to a request from the United States Government, Orsini was arrested in Dakar, Senegal. On August 25, 1975, Orsini was forcibly brought to the United States to face trial on the charges.

On October 24, 1975, the District Court (Bramwell, J.) entered an order directing an evidentiary hearing to determine the validity of defendant's allegations pursuant to *United States* v. *Toscanino*, 500 F. 2d 267 (2d Cir., 1974) and it progeny; see *United States* v. *Dominique Orsini*, et al., 402 F. Supp. 1218 (EDNY, 1975).

On August 30, 1976, Orsini issued a subpoena *duces tecum* to Anthony Marro, a reporter for *Newsweek* magazine, seeking the sources of several statements quoted in the August 16, 1976 *Newsweek* article co-authored by Marro.

On September 20, 1976, the Court (Bramwell J.) granted Marro's motion to quash.

By an order dated September 28, 1976, the Court (Bramwell J.) denied defendant's motion to dismiss on jurisdictional grounds and on the same day appellant pleased guilty. On December 17, 1976 he was sentenced to 10 years imprisonment.

III. The Testimony at the *Toscanino* Hearing

In July, 1975, the resident Drug Enforcement Administration (hereafter DEA) Agent in Argentina, one **Rhyn Tryal**, learned that Mr. Orsini was to fly from Buenos Aires to France via Dakar, Senegal on July 31* he advised the Washington DEA office of this fact on July 30 and the following day they had the Washington Interpol Office send a telegram to Dakar requesting Mr. Orsini's provisional arrest "for purposes of extradition through diplomatic channels;" Louis Fields of the United States State Department sent a similar cable to Allen Davis, the charge d'affaires of the American Embassy in Dakar (Mins. 11/20/75 at 66-80 (Fields); Mins. 11/21/75 at 134-135, 150-151 (Tryal; Mins. 1/15/76 at 32, 56-63 (Bocchicchio); Mins. 7/26/76 at 6-7, 30-31 (Davis); Deft. Ex. B (Interpol Telegram of 7/31/75. For some reason Mr. Orsini did not take the flight on July 30 (Mins. 11/20/75 at 78 [Fields]).

On August 6, 1975, Mr. Orsini left Buenos Aires for France via Dakar, Senegal; Tryal had informed DEA of the fact that Mr. Orsini was on this plane and then he boarded the plane also; Interpol was advised of this and cabled Dakar, again requesting Mr. Orsini's arrest for extradition; the State Department also informed the American Embassy of Mr. Orsini's anticipated arrival (Mins. 11/20/75 at 71 (Fields); Mins. 11/21/75 at 135-136 (Tryal); Mins. 7/26/75 at 6-7 (Davis); Def't. Exh.C [Interpol Telegram of 8/7/75]).

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*The Court sustained objections to questions as to whether Tryal had obtained this information via illegal wiretaps of Mr. Orsini in Argentina (Minutes of 11/21/75 at 129-130 (Colloquy) 143-144 (Tryal), 177-178 ']Colloquy]) (References in parentheses will be to the minutes of hearing by date and page followed, if pertinent, by the name of the witness..)

When the plane carrying Mr. Orsini and Tryal landed at Dakar, Charge' Davis and some Senegalese police were waiting; Tryal pointed out Mr. Orsini, Charge' Davis requested the police to arrest Mr. Orsini and this was done; shortly thereafter Mr. Orsini was removed from the airport (Mins. 11/21/75 at 136-137 (Tryal); Mins. 7/26/76 at 7-9 [Davis]).

The following day Interpol Dakar sent a telegram to Interpol Washington and Interpol Paris (Mr. Orsini being a French citizen) stating that Mr. Orsini had been arrested and that

> "Extradition creates no problem. Urgently transmit through diplomatic channels documents concerning the extradition" (Deft. Exh. D [Interpol Telegram of 8/8/75]).

Despite the assurance that "extradition creates no problem," there were considerable problems in that regard.

In July 1975 the American Embassy in Senegal had advised the State Department (which advised DEA) that there was no extradition treaty between the United States and Senegal (Mins. 1/15/76 at 60-61 (Bocchichio); Mins. 7/26/76 at 36-37 [Davis]).

It was for this reason that in response to Interpol Dakar's telegram referred to above Interpol Washington replied:

> "Necessary documentation concerning the extradition request is ready to be sent by diplomatic channels . . . Should your government, in accordance with the attributes of your sovereignty, decide to expel Orsini instead of extraditing him, please examine the possibility of envisaging his return to the United States" (Def't Exh. E [English translation of French translation of Interpol Washington telegram of 8/8/76]).*

*On August 8, 1975 Interpol Washington sent Interpol Dakar a telegram apparently partly in code (Def't. Exh. E [Interpol Washington telegram to Interpol Dakar of 8/8/76]). It was this telegram which was translated into French for submission to the Senegalese Court and which, translated back into English for submission to this Court is Def't Exh. E. In its original form, with the probable meaning following the code words, it reads, in pertinent part:

> "If your government, pursuant to your own Sovereign pre-rogative, decide to expell Orsini rather than to bursa [extradite], please advise as to schedule for return to fokul [United States]."

It must be remembered that all of Interpol Washington's information and suggestions came from DEA (Mins. 1/15/76 at 62-63 [Bocchichio]).

The switch from extradition to explusion was suggested by DEA which, as noted had been made aware of the absence of any extradition treaty (Mins. 1/15/76 at 60-61 [Bocchichio]).*

Mr. Orsini's family retained counsel in Senegal and he commenced a proceeding challenging the arrest and extradition attempt (Mins. 9/20/76 at 81 (Orsini), Def't Exh. A [Decision of Senegalese Court of Appeals of 8/23/75]).

On Thursday, August 21 Charge' Davis was informed that the Senegalese government wanted all the documentation that pertained to Mr. Orsini's attempted extradtion; Davis called the State Department and said the request was so urgent that it should be brought personally, by someone with legal experience, and that someone who could take custody of Mr. Orsini should accompany him; Louis Fields of the State Department and DEA agent Anthony Bocchichio were dispatched to Dakar (Mins. 7/26/76 at 11 [Davis]).

At the same time this was happening, DEA in Washington called DEA in Paris and told them to prepare a French-speaking agent to fly to Dakar to bring Mr. Orsini back to the United States the following Monday, August 25; his ticket was purchased on Friday, August 22 (Mins. 11/21/75 at 181-182, 212-217 [Collier]).

Fields and Bocchichio arrived in Dakar on Friday, August 22, met with Charge' Davis and they all went to the office of Mr. Wane Barane, the technical consul of the Senegalese Ministry of Foreign Affairs; they were told that it was urgent that they go to the Ministry of Justice, where they met a Mr. Moctar Mbacke and delivered to him the extradition documents Fields had brought;** Davis again requested that Mr. Orsini be turned over to them by Mbacke said he would contact them after the Senegalese court made its decision on the morning of Saturday, August 23; Mr.

*DEA agent Bocchichio subsequently testified that he had been "advised" that despite the absence of an extradition treaty extradition was still possible (*Id* at 64). He never explained this anomoly.

**Also present at this meeting was one Sadibou Ndiaye, director of the Judiciary Police and the Senegalese Interpol representative (Mins. 11/20/75 at 31 [Fields]).

Mbacke said he would try to deliver the extradition papers to the court before a decision was rendered (Mins. 11/20/75 at 29-37, 84-87, 97-107 (Fields); Mins. 11/21/75 at 232-235 (Bocchichio); Mins. 7/26/76 at 11-13 [Davis]).

On August 23 the Chambre d'Accusation, a division of the Senegalese Court of Appeals, declared Mr. Orsini's arrest illegal because the Interpol telegrams did not contain sufficient information to satisfy Senegalese law; the Court also noted receipt of the American extradition papers and held that the "reinforce(d) the reasons hereinabove set forth," i.e., that since there was no showing that Mr. Orsini ever committed any act in the demanding country, extradition would be denied; the Court therefore "Order[ed] that he be set free" and his belongings returned to him (Def't. Exh. A [Decision of Court of Appeals of 8/23/75]).

At mid-morning of August 23 Mr. Sadibou Ndiaye (See previous footnote), called Charge' Davis and asked if Davis could take immediate custody of Mr. Orsini until Monday morning (the next flight to the United States) and Ndiaye said he would call back; Ndiaye called back at 1:00 p.m. and said he would deliver Mr. Orsini to the airport Monday morning (Mins. 7/26/76 at 14-15 [Davis]). Davis testified that he never asked Ndiaye what decision the Court had rendered and Ndiaye did not tell him; he said he only found out that Mr. Orsini had been ordered released when he later read it in a French-language newspaper. (Mins. 7/26/76 at 59-60, 71-72 [Davis]).

Louis Fields testified that he was advised by Mr. Davis that Mr. Orsini would be delivered to the airport Monday morning; he was also advised that Mr. Orsini's arrest had been declared illegal because of a violation of the International Compact on Civic Aviation and he had been "ordered released from the custody of the Senegalese Police authorities by the Dakar Court [and that] he was released approximately noon on the 23rd" (Mins. 11/20/75 at 40, 84, 88-90 [Fields]). No American had any contact with the Senegalese between Ndiaye's second telephone call and the arrival

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*It is not clear whether this call was before or after the Senegalese Court rendered its decision.

at the airport on Monday morning (Mins. 11/20/75 at 40, 42 (Fields); Mins. 7/26/76 at 15-16 [Davis]), Fields could only have learned of the release from Davis.

Although Davis said there was "no suggestion" prior to Ndiaye's phone calls of August 23 that Mr. Orsini could be taken back to the United States on Monday, August 25 (Mins. 7/26/76 at 55 [Davis], DEA agent Collier testified that he had been told on Thursday, August 21 that he would be bringing Mr. Orsini back on August 25 (Mins. 11/21/75 at 213-214 [Collier]). This may be explained by the fact that on August 21 Davis had been advised that Mr. Orsini would be taken to this country regardless of whether extradition was granted.

The American Embassy attempted to conceal the fact that it was going to remove Mr. Orsini on Monday by first making the plane reservations in a "no name" category and then purchasing a ticket for Mr. Orsini as "John or James Smith" (Mins. 7/26/76 at 70 [Davis;]).

Although the decision of August 23 specifically directed that Mr. Orsini be released, when he was returned to the jail to receive his belongings he was kidnapped by Senegalese police aided by two Americans; he was beaten and handcuffed and taken to Central Police Headquarters where he was held incommunicado (Mins. 9/20/76 at 83-85 [Orsini]).

On the morning of August 25 the Senegalese police and the Americans came to Orsini's cell and told him he was being taken to America. When he refused they beat him and threw him against a glass partition which shatrtered and cut his hand. He was taken out of that building and put into a police truck. He was taken to a hospital and received six stitches in his hand. The Americans accompanying him refused to permit the doctor to give him a transfusion (Mins. 9/20/76 at 85-87 (Orsini); Mins. 11/20/75 at 63-65 [colloquy]).

One Marie Appoline Serge observed Mr. Orsini being beaten by the Senegalese. He was opposite the Central Police station when Mr. Orsini was taken out and put in the police truck; he saw the Senegalese police beat Mr. Orsini and he saw an American car with

diplomatic license plates nearby; one of the occupants of the car spoke to the Senegalese in French and told the police to keep Mr. Orsini quiet and take him to the airport (Deposition of 8/25/76 at 5-15 [Serge]), (Def't. Exh. F.).

During the trip to the airport the Senegalese continued to beat Mr. Orsini; he by-passed the immigration authorities and was taken right to a plane; when the back door of the truck was opened he was thrown out and dragged to the waiting Americans;* they placed him under arrest and while forcing him onto the plane one of them struck him in the back of the head; he resisited so strenuously that the pilot refused to take off; a doctor attached to the Embassy was called and, over Mr. Orsini's protests, he administered a tranquilizer to Mr. Orsini and the plane took off and flew to this country; Sadibou Ndiaye was present at the airport during all of these proceedings (Mins. 11/20/75 at 43-53 (Fields); Mins. 7/26/76 at 18-23 (Davis); Mins. 9/20/76 at 87-89 [Orsini]).**

Mr. Orsini also testified to a constant American presence during all of these proceedings. DEA agent Bocchichio was in the courtroom when the Senegalese court ordered Mr. Orsini freed, an American car followed him after the Senegalese kipnapped him; he heard English coming from the cab of the truct in which he was taken to the airport; the doctor who wanted to give him a blood transfusion declined on the ground that "The Americans are managing this affair" and the Americans gave all the orders at the airport. (Mins. 9/20/76 at 82, 84, 86-88 [Orsini]).

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*Charge' Davis testified that Mr. Orsini's clothes were disheveled and bloodstained (Mins. 7/26/76 at 68 [Davis]). Fields testified to the bandage of Mr. Orsini's wrist (Mins. 11/20/75 at 59).

**Contrary to Fields and Davis, Mr. Orsini testified that the doctor who injected him was already on the plane when he arrived (*Id* at 103).

Reasons for Granting the Writ

Point I.

By granting the motion to quash Subpoena *Duces Tecum* issued to Anthony Marro of *Newsweek* magazine by petitioner's counsel, the Court deprived petitioner of his right to compulsory process, right of confrontation, and effective assistance of counsel, since the subpoena was material and necessary to the hearing before the District Court.

On August 16, 1976, an article appeared in *Newsweek* magazine, co-authored by Anthony Marro, which discussed the means used by the DEA to secure the presence of their targets in the United States. Although the article did not discuss Orsini's case per se, Orsini's photograph was actually printed in the article as one of the victims of these DEA activities which, the article concluded, were of dubious morality and legality. It then made specific quotes the sources of which were the subject of the subpoena *duces tecum* issued by appellant. In his opposing affidavit dated September 14, 1976, Mr. Marro admitted that his sources were persons he interviewed in New York and Washington, D.C. Marro further stated that the sources of the information were "federal officials who feared that their careers would be gravely injured if it were discovered that they were providing to a reporter information that could be viewed as adverse to the Government." He further stated that "informants who work for the federal Government are extremely reluctant to provide me with criticism of official policy or with information revealing deficiences in official policy unless I promise not to disclose their identities." It had further been Marro's experience that information from such sources is often the most important which can be obtained about drug enforcement, and cannot be verified elsewhere.

A. The information sought by the subpoena is both material and relevant to the current evidentiary hearing.

In brief, the petitioner sought by the subpoena to obtain information leading to testimony that the American government has a general policy of "reaching" foreign governments to induce

them to turn over foreigners wanted on drug charges and/or that this took place in Senegal in Mr. Orsini's case.

What he had not been able to establish by direct evidence, although the facts admit of no other conclusion, is that the American government was responsible for Mr. Orsini's kidnapping, being held incommunicado and being beaten (and his wrist cut) out of the sight of any witnesses. This is what petitioner needed Mr. Marro's sources for.

B. New York law [Civil Rights Law § 79-L and Constitution, Article 1, § 8] does not apply to, nor bar the information sought in this case.

Mr. Marro cited *Baker* v. *F & F Investment*, 470 F. 2d 788 (2d Cir., 1972). cert. den. 411 U.S. 966 (1973) as authority for the proposition that the law of New York State is determinative of the issue of the "federal common law applicable to subpoenas to newsmen" (Meno. In Support of Motion of Anthony Marro to quash Subpoena at 7).

Both this citation and the conclusion drawn therefrom are inapposite to the instant matter.

Preliminarily, it is not clear that even if some state law should be referred to, that it is not clear that even if some state law should be referred to, that it is the law of New York. Mr. Marro's affidavit does not state that the federal officials whose identity is sought were interviewed in New York; he only asserts, rather vaguely, that "The information sought by the subpoena relates in part to the phrase of my newsgathering that was carried out in New York." (Affidavit of Anthony Marro at 3). On information and belief, an associate of mine, Joel A. Brenner, Esq., was told by Peter Axthelm, the co-author of this story, that Marro's sources were interviewed in Washington, D.C.* (See Affidavit of Joel A. Brenner in Opposition to Motion to Quash at 1). If nothing related

*Mr. Axthelm also told Mr. Brenner that Mr. Marro had told him who the sources were, contrary to Marro's statement that he "never revealed the identity of the sources referred to in the attached subpoena to anyone within the Newsweek organization." (Affidavit of Anthony Marro at 4.)

to the information sought in the subpoena occurred in New York then the fortuitous circumstance that this criminal case happens to be in New York should not permit the movant to invoke New York Law.

It is true that in the *Baker* case the Court referred to New York law although the information sought had been gathered in Illinois, but that was only because the law of Illinois "enunciated[d] substantially the same public policy" as that of New York. *Baker* v. *F & F Investment*, 339 F. Supp 942 (S.D.N.Y.), Aff'd. 470 F. 2d 778 (2d Cir., 1972). In this case, by contrast, the District of Columbia has not statutory "shield law" and since the operative acts occurred in the District of Columbia that jurisdiction's law should govern. See *Cervantes* v. *Time*, Inc. 464 F. 2d 986 (6th Cir., 1972); *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964). Since the District of Columbia would apply federal law to issue of a newsman's privilege (*Carey* v. *Hume*, 492 F. 2d 631, 636 n. 8 [D.C. Cir., 1974]), we are back where we started.*

The foregoing illustrates the problems which arise when a federal court looks to state law. However, it is respectfully contended that no state law need be referred to in order to resolve this motion.

If there was no federal law on the issue of a newsman's privilege before *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), there certainly is now.** And the most recent cases have held, without reference to any state law, that the federal law requires disclosure of confidential sources in a criminal case where a true need therefore is shown. See e.g., *Farr* v. *Pritchess*, 522 F. 2d 464 (9th Cir., 1975); *Lewis* v. *United States*, 517 F. 2d 236 (9th Cir., 1975); *United States*

*Baker also looked to State law because there was no federal law providing instruction on the issue of the newsman's privilege. 470 F.2d at 781. While that may have been true in the *civil* field, this is not true in the *criminal* law where the Sixth Amendment right to fair trial, and the cases decided the reunder, provide clear instructions on this issue. That state law does *not* apply in a federal criminal case is illustrated by the fact that in *Branzburg* v. *Hayes, infra*, 408 U.S. at 689, the Court made only a passing reference to state shield laws and no federal criminal case since *Branzburg* has ever mentioned these laws. See, e.g. *United States* v. *Liddy, infra*.

**The Second Circuit's decision in *Baker*, coming less than 6 months after *Branzburg*, did not have any substantial precedent to look to.

v. *Liddy*, 354 F. Supp. 208 (D.C.D.C. 1972).*

In sum, the law of New York is wholly inapplicable to the criminal proceeding and federal law requires disclosure.

If petitioner could establish, through these sources and/or others learned of from these sources, that the American government has a general policy of making bribes, or threats or giving some benefit or applying some pressure to force foreign governments to turn over suspected drug dealers and/or that this happened in Senegal he would have ahd the direct proof lacking at the hearing.

Such proof would (a) make the Senegalese agents of the American government so that this government would be directly chargeable for the brutalities the Senegalese inflicted upon Mr. Orsini, and (b) would render the absence of a protest, required by current case law, irrelevant, since a country that was a paid party to the illegalities could hardly be expected to protest to its payor.

Mr. Marro's statement that the did not discuss the Orsini case with his sources does not end this matter. Firstly, they may have been aware of the case but either he or they merely did not mention it. Secondly, even if the did not know of Orsini's case in particular, if they know of other cases and/or a general policy of doing what was done to Orsini, this testimony would be of great importance. Lastly, if they know of the Orsini abduction, or of those who know of it, additional sources might well be located.**

C. The information sought is not privileged under the first amendment to the Constitution of the United States.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) the Supreme Court reaffirmed that the First Amendment is not absolute and that there is only a conditional privilege to newsmen to refuse to divulge their confidential sources. Where it is shown that the information sought is relevant and material to the proceeding and that a

*"First Amendment values will weigh differently in civil and criminal actions." *Id* at 213 and n. 14.

**It should be pointed out that petitioner attempted to serve subpoenas on the relevant Government agencies to learn this information, but these were blocked by the Court.

compelling need therefore and interest therein exists, the privelege must yield. *Id**

As demonstrated above, the information sought is both relevant and material. The compelling need and interest in this case is no less than Dominique Orsini's Sixth Amendment Constitutional right to a fair trial.**

A California Court recently referred to:

> "[T]he preeminent importance of the fair trial guarantee to criminal defendants . . . which is certainly entitled to equal, if not greater protection than criminal investigations by grand juries . . ." *Rosato* v. *Super.* Ct., supra 3

The Court concluded:

> "[T]he right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources." Id at 215***

*Although the facts in *Branzburg* related to subpoenas issued by grand juries, there can be no doubt that the *Branzburg* reasoning and holding applies to a subpoena issued by a defendant in a criminal case. Firstly, at numerous places in the decision the Court spoke of requiring members of the press to testify "before grand juries *or at criminal trials.*" *Id* at 686, 691 (Twice), 698, 707. Secondly, numerous decisions have rejected the argument that *Branzburg* v. *Pritchess*, 522 F. 2d 464, 467 (9th Cir., 1975); *United States* v. *Liddy*, 354 F. Supp. 208, 213 (D.C.D.C.) on appl. for stay 478 F. 2d 586, 587 (D.C. Cir., 1972) (per Leventhal, J.); *Rosato* v. *Super.* Ct. 51 Cal. App. 3d 190, 213 (Ct. of App., 1975).

**This another basis for distinguishing the *Baker* case.

***In *Nebraska Press Ass'n. v. Stuary*,_____U.S._____, 96 S. Ct. 2791, 2803-4 ')1976) the Supreme Court refused to hold that the First Amendment was superior to the Sixth:

> "The authors of the Bill of Rights did not undertake to assigning priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined."

In their Memorandum in Support of the Motion to Quash (at p. 14), movants erroneously contended that *Branzburg* only held that there was no privilege relating to "possibly criminal conduct which the newsman himself had observed." Although the Court did refer to the confidentiality of sources involved in, or observed in, criminal conduct (408 U.S. at 691) the Court specifically applied its holding to "those situations where a source is not engaged in [and, therefore, cannot be observed in[criminal conduct, but has information suggesting illegal conduct by others." Id at 693.

If some agent or agency of the American government induced some agent or agency of the Senegalese government to violate the Senegalese Court's order freeing Mr. Orsini and to kidnap Mr. Orsini to turn him over to the DEA, then plainly criminal activity occurfred on the part of any American who did this. If Mr. Marro's sources were a part of this conspiracy then their "preference for anonymity . . . is presumable a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." *Id* at 691. If, on the other hand, the sources merely have knowledge of illegal activity, then, unless they are guilty of misprison of felony (18 USC §4) they can only "fear that disclosure or embarrassment." *Id* at 693. And, if they only had information that would embarrass our government, while not being criminal in nature, they have even less right to be protected.*

As for the newsman's right to protect his sources for fear they will dry up, as argued in the affidavit of Richard Cooper (and the lengthly exhibits attached thereto), it need only be pointed out that this specific contention was made to, and rejected by, the Supreme Court in *Branzburg*. *Id* at 693-95.

Stripped of excessive verbiage, the movant asked for a declaration that he has an absolute privilege to refuse to name his sources, i.e. he is seeking, in effect, what the Supreme Court in *Branzburg* said he does not have:

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*Mr. Marro's affidavit states that his sources are "federal officials who feared that their careers would be gravely injured if it were disclosed that they were providing . . . information that could be viewed as adverse to the Government."

> "[T]he Supreme Court has said that the right to gather news does not give [a newsman] a First Amendment privilege to resist a demand by proper authority that he divulge a source's identity." *United States* v. *Liddy*, supra 354 F. Supp. at 214.

II

Appellant proved that the Government secured his presence in the jurisdiction through the use of deliberate, unnecessary and unreasonable conduct amounting to a patent violation of due process principles.

The *Toscanino* trilogy (*United States* v. *Toscanino*, 500 F. 2d 267, reh. denied 504 F. 2d 1308 (2d Cir., 1974); *United States ex rel Lujan* v. *Gengler*, 510 F. 2d 62 (2d Cir. 1975)) *United States* v. *Lira*, 515 F. 2d 68 (2d Cir., 1975), can be said to basically require four things to be proven in order for the granting of a motion to dismiss an indictment: (1) an illegal abduction of the defendant from a foreign country into the United States; (2) conduct accompanying the abduction which "shocks the conscience," i.e. "torture, terror, or custodial interrogation;" (3) instigation or participation in the abduction or surrounding conduct by United States agents; and (4) a protest from the country of abduction.

It is respectfully submitted that these matters have been established even if the evidence at the hearing is viewed in a light most favorable to the Government.

It is clear that Orsini was taken into custody and arrested on August 6, 1975 in Dakar, Senegal, at the specific request of the American Chare D'Affaires in Senegal, Allan Davis, after he was identified by DEA agent Tryal, who accompanied Orsini on the trip from Buenos Aires to Senegal. Shortly thereafter, on August 22, 1975, State Department Legal Advisor Louis Fields and DEA Ageny Bocchichio arrived from the United States with extradition document and met with Charge Davis and members of Senegalese Ministry of the Interior and the Ministry of Justice.

On August 23, 1975 a representative of the Senegalese Government, Sadibou Ndiaye, the head of the Federal Judicial

Police*, indicated to Chare Davis that Orsini would be handed over to American agents at the Dakar airport on August 25, 1975.

That same day, of course, the Court of Appeals of Senegal ordered Mr. Orsini released. Yet, shortly thereafter, the Senegalese Judicial Police under the command of the ame Ndiaye, rearrested him in direct violation of the order of the Senegalese Court. Ndiaye was present at Orsini's original arrest at the Dakar airport, at his kipnapping after the Court order freeing him, at his subsequent beatings, and at the airport when Orsini was turned over to the American DEA agents.

Clearly, this action was taken at the specific request and direction of the United States Officials. The Senegalese Government had no interest in Orsini other than to accommodate the wishes of the American Charge D'Affaires and the State Department Legal Advisor.

It is submitted that the corruption of the internal processes of the Senegalese Government, by obtaining a prisoner held in direct disregard of an order of the Senegalese Court of Appeals freeing him in and of itself represents actions which "shock the conscience." Of course, Orsini also received physical abuse and illegal detention, which cannot be disregarded by holding that he obtained them because of his resistance to the acts of the Senegalese. Surely a man has the right to resist a patently unlawful arrest. It is further petitioner's contention that if the Americans corrupted the Senegalese Government to violate its own laws, then no protest can be reasonably required. *United States* v. *Marzano*, 537 F. 2d 257 (7th Cir., 1976) cf. *Elkins* v. *United States*, 364 U.S. 206 (1960); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

We urge this Court not to be blind to the realities of the situation at hand. Clearly this was an illegal abduction engineered by American agents, with the Senegalese Federal Police — especially this Chief, Sadibou Nadiaye — as their henchmen and agents to

*It must be remembered that these Senegalese police were under the command of Ndiaye, that Ndiaye was the Senegalese Interpol representative, and that Interpol had been acting for the DEA through these proceedings.

carry out the actual physical acts which culminated with Orsini being handed over to American Agents on August 25, 1975 at Dakar airport. Surely, it is not within the language and spirit of *Toscanino* for this Court to wash its hands of a series of events which American agents set into motion, directed and reaped the benefits thereof by use of corrupted agents of another government to actually do their dirty work. The principles of due process deserve more than lip service; they deserve a realistic application in a situation which is far from unique, but rather continues to be the *modus operandi* of the Drug Enforcement Administration.

Conclusion

For the above stated reasons the Petition for a Writ of Certiorari should be granted, the judgment must be set aside, and the indictment dismissed.

For the above stated reasons the Petition for a Writ of Certiorari should be granted, the judgment must be set aside, and the indictment dismissed.

Respectfully submitted,

GINO E. GALLINA
30 Broad Street
New York, NY 10004
(212) 425-1060
Attorney for Petitioner

Appendix "A"

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of May one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. MULLIGAN, Circuit Judge
HON. JAMES L. OAKES, Circuit Judge
HON. JACOB MISHLER, District Judge,*

UNITED STATES OF AMERICA,

Appellee,

— against —

DOMINIQUE ORSINI,

Appellant.

77-1019

Appeal from the United States District Court of the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are affirmed on the opinion below, reported at 424 F. Supp. 229.

William H. Mulligan

Jacob Mishler

Appendix "B"

UNITED STATES of America

v.

Dominique ORSINI, Defendant.

No. 74 CR 492.

United States District Court,
E.D. New York.

Sept. 20, 1976

Findings of Fact and Conclusions of Law
Sept. 28, 1976.

MEMORANDUM AND ORDER

BRAMWELL, District Judge.

This matter comes before the Court on the motion of *Newsweek* Magazine Reporter Anthony Marro to quash a *subpoena duces tecum* issued upon the application of the defendant, Dominique Orsini. The subpoena seeks to compel Mr. Marro to disclose the identity of certain confidential sources from whom he obtained information. This information was subsequently published and disseminated to the general public in an article appearing in the August 16, 1976 edition of *Newsweek* Magazine.

This article concerned the methods used by the Drug Enforcement Administration, an agency of the Federal Government, to obtain physical control and custody of suspected international drug dealers in order to bring such persons to the United States to stand trial for alleged violations of United States narcotics laws.

Mr. Orsini seeks this information in order to show that the circumstances surrounding his apprehension in Senegal constituted

a deprivation of due process of law, thus mandating a dismissal of the indictment against him.

Specifically, Mr. Orsini seeks documents and testimony concerning two subject matters: first, the identity of, "U.S. Officials [who] privately tell the story of how the Government of Paraguay was threatened with the loss of American aid unless it extradicted on Auguste Ricorde"; and second, the identity of, "one federal official who said, 'Clearly, we have paid for some of these people. It might not have been a specific *quid pro quo*, but we would give x dollars or x cases of ammunition to officials who helped get these people on planes.' "

I

It would seem to be the position of Mr. Orsini that the information sought in the instant subpoena would somehow prove of significant value in the determination of whether or not he was subjected to acts of "torture, brutality, and inhumanity committed against him by or at the direction of American agents." *United States v. Orsini, et al.*, 402 F. Supp. 1218 at 1219 (E.D.N.Y. 1975). As indicated in this Court's order of October 24, 1975, such allegations, if substantiated, would require the dismissal of the instant indictment filed against the defendant, as mandated by *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); and *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975). See *United States v. Orsini, et al., supra.*

Mr. Marro contends that this subpoena should be quashed on the following three grounds: first, that the information it seeks is immaterial and irrelevant to the Toscanino evidentiary hearing authorized by this Court's Order of October 24, 1975; second, that the information sought is privileged under the First Amendment to the Constitution of the United States; and third, that the information sought is privileged under New York's Newsmen's Shield Law, Section 79-H of the Civil Rights Law, and under Article I, Section 8 of the Constitution of the State of New York, as both are incorporated into the Federal Common Law.

II

After careful consideration of all the motion papers, memoranda of law, and supporting affidavits submitted to it by the respective parties, and after oral argument, this Court is of the opinion that under the circumstances presented in the instant case, the *subpoena duces tecum* issued to Mr. Marro *should* and *must* be quashed.

It is patently clear that the subject matter sought in the subpoena bears no reasonable relationship to the issue of gross mistreatment of Mr. Orsini by or at the direction of American officials. Counsel for Mr. Marro, Richard M. Cooper, Esq., and Edward L. Smith, Esq., have ably argued in motion papers and in oral argument that the information sought by the defendant is irrelevant and immaterial to the issue raised by the *Toscanino* Hearing. The Court agrees with, and has incorporated into its decision the persuasive reasoning of learned counsel on this point, concluding that the information sought by the instant subpoena has absolutely no connection with either the treatment that Mr. Orsini received while in Senegal, or with the role, if any, of representatives, officials, or agents of the United States Government with reference to such treatment.

The first item sought in the subpoena relates to a statement concerning the case of one Auguste Ricorde the events of which transpired in Paraguay. Mr. Orsini, however, was arrested and expelled from Senegal and has no known connection with Auguste Ricorde or with the nation of Paraguay. Information which relates to communications between the Government of Paraguay and the Government of the United States has absolutely no bearing on the issue of Mr. Orsini's treatment in Senegal.

The second items set forth in the subpoena is also of no relevancy to the issue of the standard of treatment accorded Mr. Orsini while he was in Senegal. The statement which is the subject of inquiry is itself not specific. Moreover, it too makes no reference to Mr. Orsini, or to any particular case. The statement does not even relate to the treatment of persons brought into the United States for trial, but rather it refers to payments, made in order to gain the cooperation of foreign governments. Such payments, to secure the

return of fugitives to the United States, would not serve as a ground for dismissal of the indictment under the *Toscanino* Doctrine. *See United States v. Toscanino, supra; United States ex rel. Lujan v. Gengler, supra; United States v. Libra, supra.* *See* also *United States v. Lovato,* 520 F.2d 1270 (9th Cir. 1975).

The standard of conduct which is proscribed by *Toscanino* and its progeny is the infliction upon the defendant of grossly cruel and inhumane treatment by or at the direction of American officials or agents. *United States v. Toscanino, supra; United States ex rel. Lujan v. Gengler, supra; United States v. Lira, supra.* *See* also *United States v. Lovato, supra.*

Mr. Orsini apparently maintains that he need not prove such cruel and inhumane treatment, but rather that a showing of bribery of foreign officials by American agents is sufficient. This position is totally contrary to the law as it now stands. The case of *United States ex rel. Lujan v. Gengler, supra,* has reasserted the continuing vitality of the *"Ker-Frisbie" doctrine which provides that:*

> [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Frisbie v. Collins, 342 U.S.519 at 522, 72 S.Ct. 509 at 512, 96 L.Ed. 541 (1952) (Mr. Justice Black writing for a unanimous court). *See* also, *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). It is manifest that if the Constitution tolerates the forcible kidnapping of a defendant to bring him to justice, then it also tolerates the payment of a bribe to obtain custody of a fugitive defendant.

Accordingly, even if Mr. Orsini were able to establish that a bribe had been paid to Senegalese officials by American agents in order to secure his return to the United States for trial, he would not be entitled to any relief under the *Toscanino* Doctrine. This, subpoena issued to prove that bribery took place is pointless and

unwarranted since it fails to provide relevant and material evidence on the *Toscanino* issue presently before the Court. The obvious irrelevancy of the statement is further underlined by the fact that in the instant case for purposes of the *Toscanino* hearings depositions have already been taken and other American officials in Senegal who would have knowledge of any alleged bribery.

Finally, it should be noted that neither of the two items sought in the instant subpoena relates in any way to a bribe in Mr. Orsini's case. Therefore permitting such inquiry would be a futile gesture.

Thus, for the reasons set forth above, the Court is clearly warranted in its finding that the *subpoena duces tecum* is irrelevant and immaterial for the purpose of the *Toscanino* hearing.

III

Turning now to the second reason put forth by Mr. Marro in his motion to quash, this Court recognizes the argument

> 1. Therefore the Court finds it unnecessary to consider the third ground raised by Mr. Marro as a basis to quash the subpoena, to wit, that the information sought by the subpoena is privileged under Section 79-H of the Civil Rights Law of New New York and Article 1, § 8 of the New York Constitution, as incorporated into Federal Common Law.

of many members of the press, that the First Amendment stands as an absolute prohibition against any official abridgement of freedom of the press. This view encompasses absolute protection of journalists against forced disclosure of their confidential sources. However, the Court finds this broad interpretation to be contrary to the weight of authority. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Democratic National Committee v. McCord, In Re Bernstein*, 356 F.Supp. 1394 (D.D.C. 1973); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975). Rather, this Court finds that there exists no absolute rule of privilege protecting newsmen from disclosure of confidential sources. Instead, what is required is a case by case evaluation and balancing of the legitimate competing interests of the newsman's claim to First Amendment protection from forced

disclosure of his confidential sources, as against the defendant's claim to a fair trial which is guaranteed by the Sixth Amendment.

However, in the instant case, it is clear that the balance of interests weighs decidedly in favor of protecting the confidentiality of Mr. Marro's sources, inasmuch as the information sought is wholly irrelevant and immaterial to the *Toscanino* issue now before this Court.

IV

Accordingly, on the grounds of irrelevancy and immateriality, as well as upon the grounds of First Amendment protection, the *subpoena duces tecum* issued to Mr. Marro is hereby quashed. 1

It is SO ORDERED.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Factual Background of the Toscanino *Evidentiary Hearing*

This matter initially came before the Court on the motion of the defendant Dominique Orsini to dismiss the indictment field against him "in the interest of justice." Mr. Orsini alleged in a sworn affidavit presented to this Court:

> that he was unlawfully kidnapped, beaten and drugged by Agents of the United States Government in Dakar, Senegal and brought to the United States. That the defendant appeared before the Court in Dakar, Senegal, and after a hearing was ordered to be released. That Agents of the United States Government, together with others acting at their directions deliberately ignored and conspired to controvert the lawful directive of the Senegalese Court and held the defendant against his will.

The defendant further alleged that he was continuously tortured, kicked and beaten. That he suffered a severe wound of the hand and was denied proper medical attention by the American Agents. Finally, that the American Agents used "drugs to reduce his

resistance and in an act of illegality kidnapped the defendant and transported him to the United States."

On October 24, 1975, this Court entered an order directing an evidentiary hearing to determine the validity of these allegations as required by *United States v. Toscanino,* 500 F.2d 267 (2d Cir. 1974) and its progeny. 1 The Court indicated in that order that the aforementioned "allegations, if substantiated, would clearly constitute a deprivation of defendant's constitutional rights of due process . . . and such denial . . . would require the dismissal of the indictment filed against Mr. Orsini." *See United States v. Dominique Orsini, et al., 402 F.Supp. 1218 (E.D.N.Y. 1975).*

The following constitutes this Court's formal Findings of Fact, Conclusions of Law, and Order with reference to the *Toscanino* evidentiary hearing.

Findings of Fact

1. In 1974, the defendant, Dominique Orsini, was indicted for a conspiracy to import and distribute narcotics into the United States by a grand jury sitting in the Eastern District of New York.

2. On July 30, 1975, the United States Department of State directed the American Embassy in Dakar, Senegal to contact the Senegalese government in order to effect the provisional arrest of the defendant, Dominique Orsini. (Hearing Minutes, 11/20/75 at 66, 70 (Fields); Hearing Minutes, 11/21/75 at 134-35 (Tryal); Hearing Minutes, 7/26/76 at 6-7 (Davis)).

3. On August 6, 1975, the defendant, Dominique Orsini, left Buenos Aires, Argentina for Nice, France via Dakar, Senegal. Agent Tryal of the United States Drug Enforcement Administration travelled aboard the very same aircraft. Upon arrival at the airport in Dakar, Senegal, Agent Tryal identified Mr. Orsini to Charge D'Affaires Allan Davis of the American Embassy in Dakar, Senegal, who in turn requested the Senegalese police to

1. *See United States ex rel Lujan v. Gengler,* 510 F.2d 62 (2d Cir. 1975); *United States v. Lira,* 515 F.2d 68 (2d Cir. 1975); *United States v. Lovato,* 520 F.2d 1270 (9th Cir. 1975).

arrest Mr. Orsini. Shortly thereafter Mr. Orsini was arrested by the Senegalese police who removed him from the Dakar Airport. (Hearing Minutes, 11/21/75 at 135-40 (Tryal); Hearing Minutes, 7/26/76 at 7-10 (Davis)).

4. No United States Government official, representative or agent had any contact or communication with Mr. Orsini between August 7, 1975 and August 25, 1975. No payment of any kind, whether of money, goods, or services was made by any American official, representative, agent, or member of the Senegalese government in exchange for their assistance in the arrest and expulsion of Mr. Orsini to the United States. (Hearing Minutes, 11/21/75 at 138-39 (Tryal); Hearing Minutes, 7/26/76 at 10, 23-24 (Davis)).

5. On August 22, 1975, State Department Legal Advisor Louis Fields, Esq. and Drug Enforcement Administration Agent Bocchichio travelled from the United States to Dakar, Senegal. Mr. Fields possessed extradition documents for defendant Orsini. Shortly after their arrival in Dakar, Mr. Fields and Agent Bocchichio met with Allan Davis, Charge D'Affaires of the American Embassy in Dakar. Thereafter, they visited the Senegalese Ministry of the Interior and the Ministry of Justice. Mr. Fields and Mr. Davis presented the extradition documents to the appropriate representatives of the Senegalese government. (Hearing Minutes, 11/20/75 at 27-38 (Fields); Hearing Minutes, 11/21/75 at 232-235 (Bocchichio); Hearing Minutes, 7/26/76 at 11-13 (Davis)).

6. On August 23, 1975, a representative of the Senegalese government, Sadibou Ndiaye, the head of the Federal Judiciary Police, indicated in a telephone call he placed to Mr. Davis that the Senegalese government would retain custody of Mr. Orsini until Monday morning, August 25, 1975, at which time Orsini would be delivered to American agents at the Dakar Airport for a Pan American flight to New York. Mr. Davis had anticipated this possibility and prior to his conversation with Mr. Ndiaye had made flight reservations for the defendant and Agents Bocchichio and Collier. This was done because Dakar—New York flights do not depart on a daily basis and are usually overbooked. Agent Collier

had previously been notified in Paris, France that it would be necessary for him to assist in the escort of Mr. Orsini from Senegal to New York in the event that the Senegalese Government was to determine that Mr. Orsini be placed in the custody of American officials. (Hearing Minutes, 11/20/75 at 38-42 (Fields); Hearing Minutes, 11/21/75 at 182 (Collier); Hearing Minutes, 11/21/75 at 235 (Bocchichio); Hearing Minutes 7/26/76 at 14-16 (Davis)).

7. On August 23, 1975 the Court of Appeals of Senegal ordered Mr. Orsini released. Shortly thereafter, the Senegalese Federal Judiciary Police apparently rearrested him.

8. On August 24, 1975, Agent Collier arrived in Dakar, Senegal. (Hearing Minutes, 11/21/75 at 182-184 (Collier)).

9. In the early morning hours of August 25, 1975, the Senegalese police attempted to take Mr. Orsini from the jail in which he was incarcerated in order to transport him to the Dakar Airport. Mr. Orsini resisted and struggled with the police. During the course of the scuffle with the police, Mr. Orsini suffered a cut wrist. Mr. Orsini was taken to the airport after receiving medical treatment for his superficial wound.

10. Upon his arrival at the Dakar Airport, Mr. Orsini violently struggled with the Senegalese police and screamed continuously. Finally, Mr. Orsini was placed aboard the aircraft which was scheduled to fly to New York. However, for safety reasons, the pilot refused to depart with Mr. Orsini aboard unless Orsini was sedated. A Peace Corps doctor who was then called, administered, with the express consent of the defendant, a dosage of valium in order to calm him. Subsequently, the aircraft departed for the United States. (Hearing Minutes, 11/20/75 at 42-49, 52-60 (Fields); Hearing Minutes, 11/21/75 at 184-194 (Collier); Hearing Minutes 11/21/75 at 236-240 (Bocchichio); Hearing Minutes, 7/26/76 at 17-24 (Davis)).

11. To the extent that Mr. Orsini alleges that he was struck by Agent Bocchichio and that excessive force was utilized by the Senegalese police in removing him from the jail to take him to the airport, his testimony is unsubstantiated and the Court discredits

that testimony. The Court further finds that Agent Bocchichio did not assault the defendant Orsini. To the extent that Mr. Marie Appoline Serge testified by deposition that he personally observed someone (possibly Orsini) being dragged from a police station in Dakar, Senegal on August 25, 1975, the Court finds that this testimony is unworthy of belief and further, that a positive identification of Mr. Orsini was not made by Mr. Serge.

12. This Court finds that Mr. Orsini was treated by the Senegalese in a fashion similar to that accorded to all other prisoners held in custody by them. (Hearing Minutes, 11/21/75 at 196 (Collier)).

13. The Senegalese Government did not protest the expulsion of Mr. Orsini to the United States. (Hearing Minutes, 11/20/75 at 60 (Fields)).

Conclusions of Law

In *United States v. Lira*, 515 F.2d 68, 70 (2d Cir. 1975), the Court set forth the controlling principles of law to be applied in a case where a *Toscanino* claim is raised:

> In general a court's power to bring a person to trial upon criminal charges is not impaired by the forcible abduction of the defendant into the jurisdiction. *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). However, in *United States v. Toscanino, supra* [2d Cir., 500 F.2d 267], we held that this general rule, sometimes referred to as the "Ker-Frisbie doctrine," is subject to the overriding principle that where the Government itself secures the defendant's presence in the jurisdiction through use of cruel and inhuman conduct amounting to a patent violation of due process principles, it may not take advantage of its own denial of the defendant's constitutional rights. We there stated that a district court must "divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary, and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275. More recently in *United States ex rel. Lujan v. Gengler*,

510 F.2d 62 (2d Cir., 1975), we reaffirmed the principle that the Ker-Frisbie doctrine does not bar judicial scrutiny of "conduct of the most outrageous and reprehensible kind by United States government agents," which results in denial of due process, 510 F.2d at 65, although we there found that the government conduct did not reach the level proscribed by *Toscanino*.

Essential to a holding that *Toscanino* applies is a finding that the gross mistreatment leading to the forcible abduction of the defendant was perpetrated by representatives of the United States Government. In *Toscanino,* for instance, we stated that upon demand the defendant would be required to establish "that the action was taken at or by the direction of United States officials."

In applying the aforementioned controlling principles of law as articulated in *Toscanino, supra; Lujan, supra,* and *Lira, supra,* to the Court's Findings of Fact previously set forth, this Court reaches the following Conclusions of Law:

1. The arrest and subsequent expulsion of the defendant Dominique Orsini from Senegal were sovereign and legitimate acts of the Senegalese Government.

2. Mr. Orsini was not beaten, tortured or subjected to inhumane treatment by American agents or officials. Moreover, there is no evidence to indicate any American involvement in any alleged assault on Mr. Orsini by Senegalese or other foreign agents or policemen. Furthermore, if Mr. Orsini was assaulted, this Court finds that American agents or officials had no knowledge of said alleged assault. Finally, the Court finds that Mr. Orsini was neither tortured nor subjected to inhumane treatment by anyone, whether American, Senegalese, or other foreign national agents.

3. The dosage of valium administered to Mr. Orsini was given with his express consent and only after the aircraft's pilot refused to depart unless Mr. Orsini was sedated. The injection was given by a licensed physician.

4. There is nothing in the record of the evidentiary hearing conducted by this Court to support a finding of American governmental conduct sufficiently shocking to reach the level of a violation of Mr. Orsini's due process rights.

5. There has been no protest lodged by the government of Senegal with reference to the departure of Mr. Orsini from Senegal to the United States.

Summary of the Court's Determinations and Order

In sum, this Court finds, after careful consideration of the testimony of the witnesses and the documentary evidence adduced at the recently concluded *Toscanino* Hearing, that the defendant Dominique Orsini was not tortured, beaten, or subjected to inhumane treatment by American agents; nor was he tortured, beaten, or subjected to inhumane treatment by Senegalese or other foreign national agents or policemen, at the rfequest of, or at the direction of, or with the consent of American agents. It is concluded that any force which may have been used by Senegalese police on August 25, 1975 was both reasonable and justified under the circumstances presented, in that Mr. Orsini was unreasonably and violently resisting the sovereign and legitimate act of the Senegalese Government in expelling him from that country.

In reaching these conclusions, the Court has credited the testimony of Agents Bocchichio, Collier, and Tryal, State Department Legal Advisor Louis Fields, Charge D'Affaires Allan Davis of the American Embassy in Dakar, Senegal and has discredited the testimony of Mr. Orsini and Mr. Serge.

The Court has further considered that no protest was made by the Senegalese Government to the proper diplomatic channels of the United States Department of State with reference to Mr. Orsini's departure from Senegal.

It should be emphasized that even if the Court were to credit Mr. Orsini's testimony, and to consider it in its most favorable light, the events surrounding Mr. Orsini's expulsion from Senegal do not reach the standard of conduct condemned and proscribed by the

Toscanino Doctrine.

Accordingly, since this Court finds that there has been no violation of the *Toscanino* Doctrine, the Court can and will assert jurisdiction over the defendant Dominique Orsini for the purpose of the prompt and fair disposition of the criminal charges involving Mr. Orsini which are now pending before it.

Therefore, the defendant's motion to dismiss the instant indictment on *Toscanino* grounds is hereby denied.

It is SO ORDERED.